RIKER DANZIG SCHERER HYLAND PERRETTI LLP

NLRB Rewrites Joint Employer Test to Expand Employer Liability

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The National Labor Relations Board recently rewrote decades of settled law and made significant changes to the "joint employer" standard. In *Browning-Ferris Industries*, the NLRB announced a new rule that will expand the scope of joint employer liability under the National Labor Relations Act. Under the new standard, a company is a joint employer if it exercises "indirect control" over working conditions or if it has "reserved authority" to do so. The prior test required that a putative joint employer actually exercise control over the terms and conditions of employment, as opposed to merely reserving the authority to do so.

The case addressed whether Browning-Ferris Industries of California, Inc. (BFI), an owner and operator of a recycling facility, should be considered a joint employer with Leadpoint Business Services (Leadpoint), a temporary staffing agency that supplied workers to the facility. Arguing that BFI was the joint employer of Leadpoint's workers, the local Teamsters Union attempted to unionize the workers provided by Leadpoint to the facility.

The NLRB's Regional Director found that Leadpoint was the sole employer under the joint employer test in effect at that time. Leadpoint handled staff discipline and training, scheduling, human resources, setting and paying wages, insurance, and time off for its employees, among other means of control. The Union appealed the Regional Director's decision.

In its 3-2 decision, the Board determined that BFI was a joint employer with Leadpoint. The Board majority concluded that the former joint employer test was "increasingly out of step with changing economic circumstances, particularly the recent dramatic growth in contingent employment relationships." The *Browning-Ferris* decision holds that two or more entities are joint employers of a single workforce if: (1) they share or codetermine those matters governing the essential terms and conditions of employment; and (2) they are both employers within the meaning

of the common law. If these factors are met, the inquiry turns to whether an employer possesses "sufficient control" over employees to qualify as a joint employer, including an assessment of whether an employer has exercised control over the terms and conditions of employment indirectly through an intermediary, or whether it has reserved the authority to do so.

The two Republican appointees on the labor board vigorously dissented from the 3-2 ruling. They argued that the majority decision was vague and will create significant uncertainty. They also stated that the decision will create liability for entities who never before would have been deemed "joint employers" by either Congress or the common law. The dissent further cautioned that "[t]his change will subject countless entities to unprecedented new joint-bargaining obligations that most do not even know they have, to potential joint liability for unfair labor practices and breaches of collective-bargaining agreements, and to economic protest activity, including what have heretofore been unlawful secondary strikes, boycotts, and picketing."

The NLRB specifically intended for its decision to "modif[y] the legal landscape for employers." In particular, organizations that use workers provided by a staffing company or another entity, as well as parties to franchise agreements, should consider reviewing their employment practices in light of this decision. If you have any questions about how this decision could affect your organization, please contact Scott Ohnegian, Daniel Zappo, or any member of Riker Danzig's Labor & Employment Group.

Attorneys:

Scott A. Ohnegian · Adam J. McInerney · Fiona E. Cousland

Practice:

Labor & Employment Law